

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

CALifornians for Renewable Energy, Inc.)	Docket Nos. EL12-83-000
Michael E. Boyd)	QF03-76-002
Robert M. Sarvey)	QF03-80-002
)	
v.)	
)	
Massachusetts Department of Public Utilities)	
Massachusetts Electric Company)	
Nantucket Electric Company)	
)	
)	

**MOTION TO DISMISS AND ANSWER OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES**

Pursuant to Rules 206(f), 212, and 213 of the Rules of Practice and Procedure (“Rules”) of the Federal Energy Regulatory Commission (“Commission”)¹, the Commission’s July 5, 2012 Notice of Petition for Enforcement and Complaint, the Commission’s July 9, 2012 Errata Notice, and the Commission’s July 10, 2012 Errata Notice, the Massachusetts Department of Public Utilities (“Mass DPU”) hereby files its combined Motion to Dismiss and Answer in response to the above-captioned Petition and Complaint (collectively, the “Petition”) filed by CALifornians for Renewable Energy, Inc. (“CARE”), Michael E. Boyd (“Boyd”), and Robert M. Sarvey (“Sarvey”) (collectively, the “Petitioners”).

The Petition is legally defective and should be dismissed in its entirety because: (1) the Petitioners do not have legal standing to initiate a petition pursuant to Section 201(h) of the

¹ 18 C.F.R. §§ 385.206(f), 385.212, and 385.213 (2010).

Public Utility Regulatory Act of 1978 (“PURPA”)², and (2) even if the Petitioners did have standing, the Petition would fail to provide a sufficient factual or legal basis to support the Petitioners’ claims.

Within the last year alone, the Commission has reminded CARE repeatedly of the basic requirements of the Commission’s Rules.³ However, for at least the fifteenth time since 2000⁴, CARE has failed to meet its minimum obligations of showing “what relief is requested and why.”⁵ The Petition, as a whole, is meandering and disjointed. It consists of bare or inadequately supported assertions, littered with inflammatory allegations that are both devoid of detail and of a stated nexus to the proceeding. Moreover, on the day after the Petitioners filed their pleading in this proceeding, they filed a nearly identical petition against the California Public Utilities Commission (“CPUC”) and others (the “California Petition”), copying the same word-for-word allegations that they assert in this Petition and leaving no doubt of the incredibility of their claims here.⁶

Should the Commission grant this Motion to Dismiss, the Mass DPU makes two related requests that are described below in greater detail. First, because the Petitioners’ facially defective pleading makes it impossible for the Commission to make a determination of the

² 16 U.S.C. § 824a-3(h) (2006).

³ See *Californians for Renewable Energy, Inc. (CARE) and Barbara Durkin v. National Grid, Cape Wind and the Massachusetts Department of Public Utilities*, 137 FERC ¶ 61,113 at PP 30-36 (2011) (“2011 Order”), *reh’g denied*, 139 FERC ¶ 61,117 (2012) (“2012 Rehearing Denial”); 2012 Rehearing Denial at PP 6-7, 11.

⁴ See 2011 Order at P 34 (noting in its thirteenth order dismissing a CARE pleading for failure to comply with the Rules that ten of CARE’s complaints filed over the last decade had been similarly dismissed). By the Mass DPU’s count, the eleventh and twelfth such dismissals came, respectively, in the order and rehearing order issued in *Californians for Renewable Energy, Inc. v. Pacific Gas and Electric Co., Southern California Edison Co., San Diego Gas & Electric Co. and the California Public Utilities Commission*, 134 FERC ¶ 61,060 (2011), *reh’g denied*, 134 FERC ¶ 61,207 (2012) . The fourteenth such dismissal came in the 2012 Rehearing Denial.

⁵ 2012 Rehearing Denial at P 11.

⁶ *Petition of Californians for Renewable Energy, Inc. et al. v. California Public Utilities Commission et al.*, Docket No. EL-12-82-000 (filed July 2, 2012). See also in Docket No. EL12-83-000 the *July 3, 2012 Notice of Petition for Enforcement and Complaint* and the *July 9, 2012 Errata Notice*. Both this Petition and the California Petition are dated July 1, 2012.

Petition's merits, the Mass DPU respectfully requests that the Commission make a finding that the Petitioners have failed to trigger the review and enforcement provisions under Section 210(h) of PURPA. The Petitioners need to exhaust administrative remedies before seeking federal court review under Section 210(h) PURPA, and the deficiency of the pleading precludes the requisite Commission review under the statute. Second, the Mass DPU respectfully requests that the Commission institute a hearing pursuant to Rule 2102⁷ to determine whether the Petitioners should be disqualified from practicing before the Commission or, alternatively, whether to take other action against the Petitioners. As a regulatory agency, the Mass DPU appreciates the gravity of this request. However, such action is warranted in light of the Commission's repeated reminders to CARE over more than ten years—the latest coming just over two months ago (i.e., the 2012 Rehearing Denial)—of the requirements of the Commission's Rules, coupled with the wholly unsupported and inflammatory allegations contained in the Petition.

I. COMMUNICATIONS

The Mass DPU requests that the individual identified below be placed on the Commission's official service list in this proceeding and that all communications related to this filing and future filings in this proceeding should be directed to:

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⁷ 18 C.F.R. § 385.2102 (2010).

II. BACKGROUND

A. PURPA Enforcement

PURPA encourages cogeneration and small power production by requiring, in part, that electric utilities purchase energy from “qualifying facilities” (“QFs”).⁸ PURPA requires the rates for such so-called “must purchases” to be: “(1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against QFs; and (3) not in excess of ‘the incremental cost to the electric utility of alternative electric energy.’”⁹ The QFs’ selling rate is thus capped at this “incremental cost”—commonly referred to as “avoided cost”—which Section 210(d) of PURPA defines as “the cost to the electric utility of the electric energy which, but for the purchase from [the QF], such utility would generate or purchase from another source.”¹⁰

The Commission has prescribed rules pursuant to PURPA and state regulatory authorities, such as the Mass DPU, are charged with implementing such rules.¹¹ Section 210(h) of PURPA grants the Commission enforcement authority against state regulatory authorities relative to implementation.¹² Further, Section 210(h)(2)(B) allows any electric utility or QF to petition the Commission to initiate an enforcement action.¹³

⁸ 16 U.S.C. § 824a-3(a) (2006); *See Xcel Energy Servs. Inc. v. FERC*, 407 F.3d 1242, 1243 (2005).

⁹ *California Public Utilities Commission*, 133 FERC ¶ 61,059 at P 22 (2010) (“CPUC Order”), *citing* 16 U.S.C. § 824a-3(b) (2006).

¹⁰ 16 U.S.C. § 824a-3(d) (2006); CPUC Order at P 22.

¹¹ 16 U.S.C. § 824a-3(f) (2006); 18 C.F.R. Part 292 (2011). For example, the Mass DPU adopted PURPA regulations in 1986. *See Investigation on the Petition of the Secretary of Energy Resources for a Rulemaking to Amend the Department’s Rule Governing Sales of Electricity by Small Power Producers and Cogenerators to Utilities and Sale of Electricity by Utilities to Small Power Producers and Cogenerators*, D.P.U. 84-276-B (Aug. 25, 1986). The Mass DPU revised these rules in 1999. *See Investigation by the Department of Telecommunications and Energy upon its own Motion, Pursuant to Sections 201 and 210 of Title II of the Public Utility Regulatory Policies Act of 1978; G.L. c. 25, § 5; G.L. c. 164, §§ 76C; and 220 C.M.R. §§ 2.00 et seq., Commencing a Rulemaking to Modify 220 C.M.R. §§ 8.00 et seq.*, D.T.E 99-38 (Dec. 27, 1999). *See also* 220 C.M.R. § 8.00 *et seq.*

¹² 16 U.S.C. § 824a-3(f), (h)(2)(A) (2006).

¹³ 16 U.S.C. § 824a-3(h)(2)(B) (2006).

However, as the Commission has noted, its enforcement authority under PURPA is discretionary.¹⁴ Moreover, “states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with [the Commission’s] regulations.”¹⁵ The Commission has stated that it is “reluctant to second guess” a state regulatory authority’s determination regarding Section 210’s rate provisions, which “are by their nature fact-specific.”¹⁶ If the Commission determines not to initiate an enforcement action within 60 days of the filing of a petition, the petitioner may then bring an action directly against a state regulatory authority in the appropriate United States district court.¹⁷

B. The Petition

The Petitioners filed their Petition with the Commission on July 1, 2012, the day before they filed a nearly identical pleading against the CPUC and others.¹⁸ The Petition “seek[s] enforcement by the FERC against Respondent Mass DPU to perform its federal-mandated regulatory duties, including federally mandated standards in connection with [PURPA], as prescribed by the [FERC].”¹⁹ The Petition broadly alleges that the Mass DPU has violated PURPA and the Commission’s implementation rules.²⁰ In some instances, named co-

¹⁴ E.g., *Rainbow Ranch Wind, LLC and Rainbow West Wind, LLC*, 139 FERC ¶ 61,077 at P 21 (2012) (“Rainbow Notice”). See *Policy Statement Regarding the Commission’s Enforcement Role Under Section 210 of the Public Utilities Act of 1978*, 23 FERC ¶ 61,304 at 61,645 (1983) (“FERC Policy Statement”) (“The Commission is not required to undertake enforcement action[.]”). Indeed, the Commission noted in a 2005 order that it has only twice granted petitions for enforcement of PURPA, with one of these grants later vacated. *ConocoPhillips Co., et al. v. L.A. Dept. of Water and Power*, 110 FERC ¶ 61,077 at n. 5 (2005) (“Conoco Notice”).

¹⁵ CPUC Order at P 24, *quoting, inter alia, American REF-FUEL Co. of Hempstead*, 47 FERC ¶ 61,161 at 61,533 (1989).

¹⁶ *Id.*

¹⁷ 16 U.S.C. § 824a-3(h)(2)(B) (2006).

¹⁸ See *supra* n. 6.

¹⁹ Petition at 1.

²⁰ See, e.g., *id.* at 5, 7-8, 11, 17-18. See also *id.* at 10 (equivocating the allegation by stating that “PURPA and its implementing regulations . . . have been repeatedly violated by Mass DPU, National Grid, Cape Wind, and/or other local grid providers . . .”) (emphasis added).

Respondents National Grid²¹ and Cape Wind Associates, LLC (“Cape Wind”)²² are also alleged to have failed to enforce or otherwise comply with PURPA.²³ The Petition also implicates unnamed “local power grid providers.”²⁴ The Petition further alleges that the named Respondents “conspired,” “collaborated,” “acted in concert,” engaged in a “civil conspiracy,” and “were each an agent of the other.”²⁵

The Petitioners state in conclusion that “the violations committed . . . are, specifically: Rate Setting of Price to be paid QF generators . . . ; access to interconnection to the electric grid; and fair and just non-price terms, i.e., the standardized contract between the Massachusetts Utilities and the renewable generators.”²⁶ The Petition requests, as it does word-for-word in the California Petition, that the Commission make a finding that the named Respondents have “willfully and wantonly together violated PURPA and the Commission’s regulations implementing PURPA.”²⁷

For the reasons provided below, the Mass DPU denies these meritless allegations.

III. MOTION TO DISMISS AND ANSWER

A. The Petitioners Lack Standing to Initiate a Section 210(h) Petition

The Petitioners lack legal standing to seek the Commission’s enforcement pursuant to Section 210(h) of PURPA or have failed to provide sufficient facts to establish such standing.

The plain language of the PURPA statute clearly lists those private entities that may initiate an

²¹ National Grid plc is the parent company of Massachusetts Electric Company and Nantucket Electric Company. These subsidiaries are the other Respondents in this proceeding and we refer to them collectively herein as “National Grid.”

²² Cape Wind Associates, LLC was dismissed as a Respondent in this proceeding pursuant to the Commission’s *July 10, 2012 Errata Notice*.

²³ See Petition at 5, 8, 17. See also *id.* at 10 (equivocating the allegation by stating that “PURPA and its implementing regulations . . . have been repeatedly violated by Mass DPU, National Grid, Cape Wind, and/or other local grid providers . . .”) (emphasis added).

²⁴ *Id.* at 8, 10.

²⁵ *Id.* at 7, 12. See also *id.* at 18.

²⁶ *Id.* at 18.

²⁷ *Id.* at 19.

enforcement action against a state regulatory agency or nonregulated utility: electric utilities and QFs.²⁸ CARE claims to be neither an electric utility nor a valid QF. Rather, CARE states that it is a California non-profit organization “representing electric utilities [including Boyd and Sarvey] which are Qualified Facilities.”²⁹ The PURPA statute “expressly declares the interests of particular parties,” which includes, as stated above, electric utilities and QFs.³⁰ Organizations like CARE that claim such entities among their members are not “expressly declared” an interest in the statute, nor does the plain language of PURPA support an assertion that the statute intended to benefit such a broad class of claimants.³¹

Boyd and Sarvey similarly lack standing in this proceeding or have failed to provide sufficient facts to demonstrate standing. Both appear to be owners, in Trust, of QFs.³² However, the two QFs cited are both located in California, thousands of miles from Massachusetts and not even part of the same electric interconnect as the New England system and the utilities to which a QF might seek to sell power.³³ While Section 210(h)(2)(B) of PURPA specifically names electric utilities and QFs as having a right to file with the Commission a petition for enforcement, such right is expressly linked with enforcement related to noncompliance by a particular state regulatory authority or nonregulated electric utility.³⁴ The Mass DPU is unable to

²⁸ 16 U.S.C. § 824a-3(h)(2)(B) (2006).

²⁹ Petition at 7.

³⁰ *Liquid Carbonic Industries Corp. v. FERC*, 29 F.3d 697, 704 (D.C. Cir. 1994) (“*Liquid Carbonic*”).

³¹ *Accord id.* (discussing the intended beneficiaries of PURPA and noting that “[t]he intended beneficiaries of a statute cannot include any party interested in or affected by an agency’s decision unless the zone of interest test is meaningless. This interpretation would confer standing on a larger group of claimants than the Constitution permits, an improbable result given that the zone of interest test is meant to narrow the field of potential challengers.”); *Appalachian Power Co.*, 137 FERC ¶ 61,208 at P 15 (2011) *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (Article III standing requires “an injury that is concrete, particularized, and actual or imminent and is fairly traceable to the defendant’s challenged action.”).

³² Boyd Michael Trustee et al., FERC Form 556, Docket No. QF03-76-000 (filed Mar. 19, 2003); Sarvey Robert Trustee et al., FERC Form 556, Docket No. QF03-80-000 (filed Mar. 28, 2003).

³³ Specifically, the QF apparently owned in Trust by Boyd is located in Soquel, California and the QF apparently owned in Trust by Sarvey is located in Tracy, California.

³⁴ While we focus our argument on standing related to a petition seeking enforcement against the Mass DPU, we note that the other Respondent in this proceeding, National Grid, is neither a state regulatory authority

discern how any alleged action or inaction of the Mass DPU in implementing PURPA, even assuming the truth of any such allegation, could directly affect or injure QFs with no physical capability of interconnecting in Massachusetts or anywhere on the entire New England system. Stated another way, even if the Commission found that the Mass DPU had failed to comply with Section 210(f) of PURPA and took appropriate action to ensure compliance, Boyd and Sarvey, at least insofar as the Petition alleges, would not be beneficiaries of the Commission's enforcement.³⁵ PURPA is designed to ensure that QFs are accorded "a market for their electricity production."³⁶ The Mass DPU cannot square that intent with enforcement whereby *any* QF could bring an action against *any* state regulatory authority, irrespective of the QF's geographic location.

The Petitioners lack legal standing to petition the Commission under Section 210(h) for enforcement against the Mass DPU and, therefore, the Section 210(h) action should be dismissed.

B. The Petitioners Fail to State a Legally Cognizable Claim and Provide Insufficient Factual Support and Analysis to Support their Claims

As noted above, the Petition contains broad and unsupported allegations, loosely connected and lacking both legal and factual specificity. Rather than conforming to the Commission's Rules, the Petitioners have "heaved the entire contents of a pot against the wall in hopes that something would stick."³⁷ The Commission should decline "to sort through the noodles in search of [the Petitioners'] claim" and should dismiss the Petition.³⁸

nor a nonregulated utility. Accordingly, Section 210(h) does not appear to permit an enforcement action against National Grid as well.

³⁵ Additionally, to the extent Boyd and Sarvey would even be beneficiaries of enforcement, it would be in their capacity as trustees, although the Petition is brought by both in their individual capacities.

³⁶ *Liquid Carbonic* at 699.

³⁷ *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929-930 (9th Cir. 2003).

³⁸ *Id.*

As a Respondent, the Mass DPU is unable to discern even the threshold question of whether the pleading consists solely of a Section 210(h) petition or whether the Petitioners assert separate claims pursuant to Section 206 of the Federal Power Act (“FPA”) or other statutes or regulations. For example, the Petitioners state that they “seek enforcement by the FERC against Respondent Mass DPU to perform its federal-mandated regulatory duties, *including* federal mandated standards in connection with [PURPA],” giving the impression that the Petitioners are making additional claims against the Mass DPU that lie outside PURPA.³⁹ Given the meandering and incoherent nature of the Petition, this combined Motion to Dismiss and Answer applies to allegations related to PURPA, Section 206 of the FPA⁴⁰, and other statutes and regulations on which the Petitioners purport to rely.

The Petitioners’ pleading, quite simply, fails to meet the basic minimum requirements set forth in the Rules and should be dismissed. The Commission requires in Rule 203(a) that all pleadings include the “relevant facts” as well as the “position taken by the participant . . . and the basis in fact and law for such position.”⁴¹ Rule 206 provides a list of requirements “designed to enable the Commission to understand a complaint and appropriately act on it.”⁴² These include the directive that “a person filing a complaint clearly identify the action or inaction that

³⁹ Petition at 2 (emphasis added).

⁴⁰ More specifically, to the extent the Petitioners are asserting a complaint under Section 206 of the FPA, the Mass DPU repeats its answer to CARE’s 2010 Complaint against the Mass DPU that the Commission lacks jurisdiction over the Mass DPU. *See* Answer to Complaint, Motion to Dismiss, and Notice of Intervention of the Massachusetts Department of Public Utilities, Docket No. EL11-9-000, at 6-8 (Dec. 22, 2010) (“2010 Answer”). As we stated in the 2010 Answer, the Commission’s authority over complaints under Section 206 of the FPA, 16 U.S.C. § 824e, is statutorily limited by the exemption for governmental entities under Section 201(f) of the FPA, 16 U.S.C. § 824(f), and by the definition of “public utility” under section 201(e) of the FPA, 16 U.S.C. § 824(e). *See Bonneville Power Administration v. FERC*, 422 F.3d 908, 915-922 (9th Cir. 2005). The Mass DPU is not a public utility under the FPA’s definition and the Mass DPU, as a governmental entity, is exempt from the Commission’s regulation. The Mass DPU also bases its claim of exemption upon state sovereign immunity. *See Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) (holding that state sovereign immunity bars a federal agency from adjudicating a private party’s complaint against a state agency).

⁴¹ 18 C.F.R. § 385.203(a) (2010). *See* 2011 Order at P 13; 2012 Rehearing Denial at P 10.

⁴² 2012 Rehearing Denial at P 6. *See* 18 C.F.R. § 385.206 (2010).

constitutes an alleged violation and explain how the action or inaction violates the applicable statutory standard or regulatory requirement; and state the specific relief requested.”⁴³ The Petition fails to conform to these standards.

For example, the Petitioners’ claim that they have repeatedly complained to the Mass DPU and others regarding the alleged “unlawful acts and omissions” and that the Mass DPU “failed to take corrective action, sometimes simply failing to act at all after protracted delays.”⁴⁴ However, the Petitioners utterly fail to accompany such claims with supporting detail, such as correspondence or even the mere mention of a date. Indeed, the Mass DPU has no knowledge of the Petitioners having ever filed with our agency a complaint, request, or petition for PURPA enforcement or other relief.⁴⁵

At other points, the Petitioners make numerous inflammatory and false claims against the named Respondents and use legally loaded terms like “conspiracy,” “collusion,” and “concert,” in every instance without one supporting fact to back-up their charged rhetoric.⁴⁶ Moreover, similar to CARE’s 2010 Complaint against the Mass DPU, National Grid, and Cape Wind⁴⁷, the Petition fails to state explicitly what authority the Commission has, if any, to remedy any alleged conspiracy, collusion, and concerted activity.⁴⁸

Further, the Petitioners’ bald assertions are contradicted by the Mass DPU’s actions regarding PURPA. Section 210(h)(2) concerns enforcement “for the purpose of compelling

⁴³ 2012 Rehearing Denial at P 6. *See* 2011 Order at P 30.

⁴⁴ Petition at 17.

⁴⁵ The Mass DPU has received a complaint from Allco Renewable Energy Limited, an entity cited by the Petitioners in reference to a Commission proceeding, and such complaint (docketed as D.P.U. 11-59) is currently under consideration.

⁴⁶ *See supra* n. 25.

⁴⁷ Complaint of Californians for Renewable Energy, Inc. (CARE) and Barbara Durkin v. National Grid, Cape Wind, and the Massachusetts Department of Public Utilities, EL11-9-000 (filed Dec. 1, 2010) (“2010 Complaint”).

⁴⁸ *See* 2011 Order at P 35.

implementation” of PURPA.⁴⁹ However, as previously noted, the Mass DPU adopted PURPA regulations in 1986.⁵⁰ These regulations were revised in 1999 following the enactment of legislation in Massachusetts that “restructured” the electric utility industry.⁵¹ Since the Mass DPU’s initial implementation of PURPA more than 15 years ago, the Mass DPU has closely followed both the letter and spirit of PURPA and the Commission’s related rules. The Petitioners’ argument that the Mass DPU has failed to comply with or enforce PURPA and its implementation rules is belied by the Mass DPU’s own implementation and actions regarding its rules.

Additionally, the Petitioners cannot attempt to refashion a failed argument from the 2010 Complaint regarding a contract approved pursuant to state law. The Petitioners make reference on several occasions to a “Cape Wind PPA” or “PPA-1” and appear to allege that a contract between National Grid and Cape Wind violated PURPA.⁵² Once again, the Commission should reject this contention. Notwithstanding the Petitioners’ attempt at another bite of the apple, as the Commission noted in its 2011 Order, the Petition fails to provide any information or analysis regarding “what the contract rates are, what the utilities’ avoided costs are, and whether Cape Wind is even a QF (for which avoided costs are relevant)[.]”⁵³ The contract at issue was entered into pursuant to state law mandate⁵⁴, approved by the Mass DPU acting within its authority under

⁴⁹ FERC Policy Statement at 61,644.

⁵⁰ *See supra* n. 11.

⁵¹ *See id.*

⁵² Petition at 10-11, 13-15. The contract that appears to be at issue is discussed in extensive detail in *Massachusetts Electric Co. and Nantucket Electric Co., each d/b/a National Grid*, D.P.U. 10-54 (2010).

⁵³ 2011 Order at P 32 (footnote omitted).

⁵⁴ *See* An Act Relative to Green Communities, 2008 Mass. Act c. 169, § 83 and 220 C.M.R. § 17.00 et seq.

state law and upheld unanimously by the state’s Supreme Judicial Court⁵⁵, and is inapposite to alleged PURPA violations.⁵⁶

C. The Facially Defective Petition Makes it Impossible for the Commission to Take Action Pursuant to Section 210(h)

Section 210(h)(2) of PURPA “authorizes certain private enforcement actions for the purpose of compelling implementation.”⁵⁷ An electric utility or QF seeking enforcement must first petition the Commission to initiate its enforcement pursuant to Section 210(h)(2)(A) and then the Commission has 60 days to decide whether to pursue enforcement.⁵⁸ In declining to act on petitions seeking enforcement under Section 210(h)(2)(B), the Commission has, in practice, issued a “Notice of Intent Not to Act.”⁵⁹ Only after the Commission has declined or failed to initiate an enforcement action within this 60-day window can a petitioner bring an action directly against a state regulatory authority or nonregulated utility in federal district court.⁶⁰

As described above, the Petition is unsupported, largely incoherent, and fails to comply with the minimum requirements of the Rules. These facial deficiencies make it impossible for the Commission to determine whether to pursue enforcement under Section 210(h)(2), which is a condition precedent for private enforcement in federal district court. Stated another way, the Petitioners have failed to exhaust their administrative remedies with the Commission by virtue of their defective pleading and should not be permitted to circumvent Commission review by seeking direct review in a United States District Court. Accordingly, if the Commission finds that the Petitioners have submitted a facially defective pleading and dismisses the Petition, the

⁵⁵ *Alliance to Protect Nantucket Sound, Inc. v. Department of Public Utilities*, 461 Mass. 166 (2011).

⁵⁶ The Mass DPU additionally adopts and incorporates by reference its more detailed arguments on this issue in its 2010 Answer.

⁵⁷ FERC Policy Statement at 61,644.

⁵⁸ 16 U.S.C. § 824a-3(h)(2)(A)-(B) (2006).

⁵⁹ See, e.g., Rainbow Notice; *Benjamin Riggs v. Rhode Island Public Utilities Commission*, 138 FERC ¶ 61,172 (2012); Conoco Notice.

⁶⁰ 16 U.S.C. § 824a-3(h)(2)(B) (2006).

Mass DPU asks that the Commission withhold issuance of a “Notice of Intent Not to Act” and take no action pursuant to Section 210(h) but, rather, make an explicit finding that the facially defective Petition does not conform to the requirements under Section 210(h)(2)(B) for seeking Commission review and that, therefore, the 60-day statutory review period has yet to commence.

D. The Commission Should Institute a Hearing Pursuant to Rule 2102 to Consider the Petitioners’ Conduct and Take Appropriate Action

Pursuant to Rule 2102, the Commission may commence a hearing to determine whether to “disqualify and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to a person who is found . . . to have engaged in unethical or improper professional conduct[.]”⁶¹ Additionally, “[a] person appearing before the Commission . . . must conform to the standards of ethical conduct required of practitioners before the Courts of the United States[.]”⁶² The Mass DPU respectfully requests that the Commission initiate a hearing pursuant to Rule 2102 to investigate the Petitioners’ conduct.

The Commission has repeatedly reminded CARE of the basic requirements for pleadings, the shortcomings of CARE’s past filings, and the Commission’s expectation that CARE will comply with the Rules in future proceedings.⁶³ Indeed, less than one year ago, the Commission found that CARE’s 2010 Complaint “demonstrated that CARE has chosen to ignore [the Commission’s] orders and . . . guidance.”⁶⁴ Just over two months ago, the Commission *again* reminded CARE of the acceptable parameters of FERC practice.⁶⁵ Yet, CARE’s conduct has remained unchanged. As stated above, the Petition represents at least the fifteenth time since 2000 that CARE has failed to conform to the basic requirements of the Rules.⁶⁶

⁶¹ 18 C.F.R. § 385.2102(a)(2) (2010).

⁶² 18 C.F.R. § 385.2101(c) (2010).

⁶³ See 2011 Order at PP 30-36; 2012 Rehearing Denial at PP 6-8, 10-11.

⁶⁴ 2011 Order at P 34.

⁶⁵ 2012 Rehearing Denial at P 6.

⁶⁶ See *supra* n. 4.

At best, CARE is utterly incapable of conforming to the Rules and avoiding the kind of combative, uncorroborated, and defamatory accusations it has carelessly hurled at the Mass DPU and others. At worst, CARE has knowingly and intentionally ignored the Commission's repeated directives, with the intention of filing nuisance petitions and costing respondents time and resources to answer empty allegations. Given CARE's long pattern of meritless claims and the particularly egregious allegations made in the Petition, the Commission should open a proceeding to consider disqualifying CARE from FERC practice.

Alternatively, if the Commission determines that disqualification is not warranted at this time, the Mass DPU respectfully requests that CARE not be permitted to file any pleading against the Mass DPU without first seeking leave of the Commission. CARE should not be permitted to drain state resources with continued meritless claims.

As to Boyd and Sarvey, the Petition alone provides the basis for the Commission to undertake a review of their conduct pursuant to Rule 2102. At minimum, for the reasons set forth above, Boyd and Sarvey should be required to seek leave of the Commission before filing a pleading against the Mass DPU and they—and perhaps all purported CARE members—should be sternly warned about conforming to the Commission's ethical and professional standards of conduct. In the event the Commission suspends, disqualifies, or otherwise limits CARE in its practice before the Commission, such a warning would make clear that CARE is not free to circumvent the Commission's actions by swapping its name for that of individual members.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the Mass DPU hereby files this Motion to Dismiss and Answer and respectfully requests that the Commission: (1) dismiss the Petition; (2) not pursue any action under Section 210(h) of PURPA and make an explicit finding that the Petition does not comply with the requirements of Section 210(h) and that the 60-day review

period has yet to toll; and (3) institute a hearing pursuant to Rule 2102 to consider disqualification of the Petitioners or other appropriate action.

Respectfully submitted,

MASSACHUSETTS DEPARTMENT OF
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By its attorney,

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Date: July 23, 2012

CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.2010 (2008), I hereby certify that I have this day served, via electronic mail or first class mail, the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Boston, MA on this 23rd day of July, 2012.

/s/ Jason R. Marshall

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